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Poh Siew Cheng v American International Assurance Co Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–354 OF 1993
B ABDUL MALIK ISHAK J
28 OCTOBER 2005

Agency — Liability of principal — Agency, defendant claiming — Insurance agent —
C *Knowledge imputed to principal — Whether knowledge of agent deemed knowledge of insurer — Insurance Act 1963 s 44A*

Evidence — Burden of proof — Agent of the defendant — Whether the defendant must call the agent as witness
D

Evidence — Documentary evidence — Proof must be by maker — Whether maker of the documents need to be called to proof the documents

E

Evidence — Hearsay — Admissibility — Witness giving evidence of what he heard —
Whether admissible — Evidence Act 1950 s 60(1)(b)

Insurance — Contract of insurance — Formation of contract — Authorized agent of
F *insurer — Filled proposal form for policyholder who was not conversant in English language — Imputed knowledge — Whether knowledge of agent deemed knowledge of insurer — Insurance Act 1963 s 44A*

G *Insurance — Contract of insurance — Formation of contract — Whether disclosure to one branch constitute constructive notice to another branch*

The plaintiff is a Singaporean. His wife owned a factory in Johor Bahru. Whilst the
H plaintiff was in his wife's factory in Johor Bahru, he was approached by the defendant's insurance agent one Ng See Sun who kept on pestering him to purchase a personal accident policy. As an agent, Ng See Sun then took out a proposal form and started filling in the details. The plaintiff disclosed the fact that he was suffering from diabetes and that he had life and personal accident policies in Singapore. Ng See
I Sun in filling up the proposal form did not write down all these facts and Ng See Sun told the plaintiff that he (referring to Ng See Sun) did not require the details of the insurance policies in Singapore. When the plaintiff received his personal accident insurance policy, he realized that the details of his diabetic condition were not disclosed. The plaintiff's daughter also called Ng See Sun and she was told by Ng See Sun that the diabetic condition of her father need not be written in the proposal form

as it was a personal accident policy and not a life policy. On 6 September 1991, while the plaintiff was working he accidentally slipped and fell knocking onto the glass plate of a showcase shelf. As a result of the accident, the plaintiff suffered injury on his left eye. The plaintiff claimed for compensation arising out of that personal accident insurance policy from the defendant. The defendant refused to pay on the ground the plaintiff failed to disclose that he is diabetic in the proposal form. Thus this action was instituted by the plaintiff. The learned counsel for the defendant argued that the plaintiff should call Ng See Sun as his witness because the burden of proof lies with the plaintiff as per s 103 of the Evidence Act 1950 and the defendant suggested that the evidence of the plaintiff in relation to what had transpired between the plaintiff and Ng See Sun was hearsay because Ng See Sun was not called by the plaintiff to testify. Defendant also argued that there was a basis clause or a warranty clause in the insurance contract whereby the truthfulness of the answers given by the plaintiff in the proposal form was warranted by the plaintiff and made the basis of the contract The court was also asked to make a ruling on the admissibility of documents where the maker was not called as witness.

Held, allowing plaintiff's claim with costs:

(1) An agent may make a contract for his principal which has the same consequences as if the principal has made it himself. In respect of the acts which the principal expressly or impliedly consents that the agent shall do on the principal's behalf, the agent is said to have the authority to act and it is this authority that constitutes the power to affect the principal's legal relations with third parties. Thus, an agent employed by an insurance company to solicit business is, without a shadow of a doubt, an agent of the company and no one else (see paras 10, 11).

(2) The plaintiff had disclosed the fact of him suffering from diabetes and also the fact that there were in existence several insurance policies in Singapore in his favour to the agent and such knowledge shall be deemed to be within the knowledge of the defendant pursuant to s 44A of the Insurance Act 1963 (see para 22).

(3) The defendant is a company incorporated in Hong Kong with branches in Singapore and Malaysia. The fact that the plaintiff had disclosed his diabetic condition to the AIA branch in Singapore would be sufficient to constitute constructive notice to its branch in Malaysia, after all, the defendant is the same — namely, American International Assurance Co Ltd. The defendant's branches practice of not communicating with one another given the current practice of an online computers stretching all over the globe is certainly difficult to believe and accept (see para 23).

(4) The concept of constructive notice can also be imputed to the facts of the present case and when so imputed it can be shown that the defendant had such knowledge over and above that as provided for under s 44A of the Insurance Act 1963 (see para 23).

(5) If the plaintiff were to call the defendant's agent Ng See Sun, this court would readily construe that there is collusion between the plaintiff and the defendant's agent (see para 44).

(6) Ng See Sun was and is an agent of the defendant and it was he who filled the proposal form. Being an agent of the defendant, the defendant should be the one who should be calling Ng See Sun, after all, the latter was and is still the defendant's employee. Why should the plaintiff risk calling Ng See Sun as his witness bearing in mind that Ng See Sun may turn turtle and, of crucial importance, this court would even construe Ng See Sun to be in collusion with the plaintiff and thereby the weight to be attached to Ng See Sun's evidence would be minimal (see para 46).

(7) Evidence of the plaintiff it simply meant that the plaintiff heard what Ng See Sun had said. The plaintiff heard it directly, just like an eye witness, and he now testified based on what he had heard. It was and it is in the nature of a direct evidence and it is admissible. It certainly cannot be hearsay. The same would be true for the oral evidence of the plaintiff's daughter: s 60(1)(b) of the Evidence Act 1950 (see para 59).

(8) Diabetes need not be disclosed in personal accident policies because it is not a serious illness or disease which would prevent the insured from leading a normal working life (see para 62).

(9) There was no breach of the basis clause. It was Ng See Sun's misdeeds in not incorporating the plaintiff's diabetic condition and the insurance coverage which the plaintiff took in Singapore. The oral testimonies of both the plaintiff and his daughter were worthy of credit and they were accepted. There was nothing improbable about their versions as to what actually happened. Their versions were the direct evidence of the case at hand (see para 64).

(10) The accidental fall was the direct and independent cause of the removal of the lens as stated in the policy. It was for these reasons that the plaintiff was entitled to receive RM250,000 from the defendant (see para 70).

(11) By virtue of s 73A of the Evidence Act 1950, the court ruled that DID-22 and DID-21 were not admissible because the makers of these documents were not called as witnesses (see para 104).

[Bahasa Malaysia summary

Plaintif seorang warganegara Singapura. Isterinya memiliki sebuah kilang di Johor Bahru. Sewaktu plaintif berada di kilang isterinya di Johor Bahru, beliau telah didatangi oleh ejen insurans defendan bernama Ng See Sun yang mendesaknya untuk membeli polisi kemalangan peribadi. Sebagai seorang ejen, Ng See Sun kemudian telah mengeluarkan satu borang cadangan dan mula mengisi butir-butir dalamnya. Plaintif mendedahkan bahawa beliau menghidap penyakit diabetes dan bahawa beliau mempunyai polisi-polisi kemalangan nyawa dan peribadi di Singapura. Ng See Sun semasa mengisi borang cadangan tidak menulis semua fakta tersebut dan Ng See Sun telah memberitahu plaintif bahawa beliau (merujuk kepada Ng See Sun) tidak memerlukan butiran polisi-polisi insurans di Singapura. Apabila plaintif menerima polisi insurans kemalangan peribadinya, beliau menyedari

bahawa maklumat tentang keadaan diabetesnya tidak dimaklumkan. Anak perempuan plaintif juga telah memanggil Ng See Sun dan beliau diberitahu oleh Ng See Sun bahawa keadaan diabetes bapanya tidak perlu ditulis dalam borang cadangan itu kerana ia adalah polisi kemalangan peribadi dan bukan polisi nyawa. Pada 6 September 1991, semasa plaintif bekerja beliau tergelincir dan jatuh terlanggar rak kaca almari perhiasan. Akibat daripada kemalangan itu, plaintif mengalami kecederaan pada mata kirinya. Plaintif menuntut pampasan yang timbul daripada polisi insurans kemalangan peribadi daripada defendan. Defendan enggan membayar atas alasan plaintif gagal untuk menyatakan bahawa beliau seorang diabetes dalam borang cadangan. Oleh itu tindakan ini telah dimulakan oleh plaintif. Peguam bijaksana bagi pihak defendan berhujah bahawa plaintif sepatutnya memanggil Ng See Sun sebagai saksinya kerana beban pembuktian terletak pada plaintif seperti dinyatakan s 103 Akta Keterangan 1950 dan defendan mencadangkan bahawa keterangan plaintif berkaitan apa yang telah berlaku antara plaintif dan Ng See Sun adalah dengar cakap kerana Ng See Sun tidak dipanggil oleh plaintif untuk memberikan keterangan. Defendan juga menghujahkan bahawa terdapat satu klausa asas atau klausa waranti dalam kontrak insurans yang mana kebenaran jawapan yang diberikan oleh plaintif dalam borang cadangan adalah wajar oleh plaintif dan menjadi asas kontrak. Mahkamah juga perlu membuat keputusan tentang kebolehterimaan dokumen-dokumen yang mana pembuatnya tidak dipanggil sebagai saksi.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Ejen boleh membuat kontrak untuk prinsipalnya yang mempunyai akibat sama seperti jika prinsipal membuatnya sendiri. Berhubung tindakan yang prinsipal bersetuju secara nyata atau tersirat bahawa ejen akan bertindak bagi pihak prinsipal, ejen dikatakan mempunyai autoriti untuk bertindak dan autoriti inilah yang membentuk kuasa untuk melaksanakan hubungan sah prinsipal dengan pihak ketiga. Oleh itu, ejen yang diambil bekerja oleh syarikat insurans untuk mendapat perniagaan adalah, tanpa sebarang keraguan, ejen syarikat itu dan tiada siapa yang lain (lihat perenggan 10, 11).

(2) Plaintif telah memaklumkan fakta yang beliau menghidap diabetes dan juga fakta bahawa terdapat beberapa polisi insurans di Singapura dalam namanya kepada ejen itu dan pengetahuan sedemikian hendaklah dianggap dalam pengetahuan defendan menurut s 44A Akta Insurans 1963 (lihat perenggan 22).

(3) Defendan adalah sebuah syarikat yang ditubuhkan si Hong Kong dengan cawangan di Singapura dan Malaysia. Fakta bahawa plaintif telah memaklumkan tentang keadaan diabetesnya kepada cawangan AIA di Singapura adalah memadai untuk membentuk notis konstruktif kepada cawangannya di Malaysia, bahkan, defendan adalah yang sama — iaitu, American International Assurance Co Ltd. Cawangan defendan yang tidak mengamalkan perhubungan antara satu dan lain berdasarkan amalan semasa iaitu berkomputer melalui talian ke semua pelususk dunia memang sukar untuk dipercayai dan diterima (lihat perenggan 23).

(4) Konsep notis konstruktif juga boleh berlaku berdasarkan fakta-fakta kes semasa dan apabila berlaku ia boleh menunjukkan bahawa defendan mempunyai pengetahuan lebih daripada apa yang diperuntukkan di bawah s 44A Akta Insurans 1963 (lihat perenggan 23).

(5) Jika plaintif memanggil ejen defendan, Ng See Sun, mahkamah ini bersedia untuk mentafsirkan bahawa terdapat pakatan sulit antara plaintif dan ejen defendan (lihat perenggan 44).

(6) Ng See Sun adalah ejen defendan dan beliaulah yang mengisi borang cadangan itu. Sebagai ejen defendan, defendan sepatutnya memanggil Ng See Sun, bahkan, beliau masih pekerja defendan. Mengapa pula plaintif mengambil risiko untuk memanggil Ng See Sun sebagai saksinya dengan mengambilkira Ng See Sun mungkin menidakkan perbuatannya dan, paling penting, mahkamah ini mungkin akan mentafsirkan Ng See Sun mempunyai pakatan sulit dengan plaintif dan oleh itu beban yang terletak pada keterangan Ng See Sun adalah minimum (lihat perenggan 46).

(7) Keterangan plaintif bermaksud bahawa plaintif mendengar apa yang dikatakan oleh Ng See Sun. Plaintif mendengarnya secara terus, seperti saksi utama, dan beliau sekarang memberikan keterangan tentang apa yang didengarnya. Ia adalah bersifat keterangan terus dan boleh diterima. Ia tidak mungkin dengar cakap. Yang sama juga benar untuk keterangan lisan anak perempuan plaintif: s 60(1)(b) Akta Keterangan 1950 (lihat perenggan 59).

(8) Diabetes tidak perlu dimaklumkan dalam polisi kemalangan persendirian kerana ia bukan penyakit yang serius yang menghalang yang diinsuranskan menjalani hidup bekerja yang normal (lihat perenggan 62).

(9) Tiada pelanggaran klausa asas. Ia adalah kesalahan Ng See Sun yang tidak memasukkan keadaan diabetes plaintif dan perlindungan insurans yang plaintif ambil di Singapura. Keterangan lisan kedua-dua plaintif dan anak perempuannya wajar dipercayai dan diterima. Tiada apa yang tidak masuk akal tentang versi mereka tentang apa yang sebenarnya berlaku. Versi mereka adalah keterangan terus kes ini (lihat perenggan 64).

(10) Jatuh yang tidak disengajakan itu adalah sebab secara langsung dan berasingan perlunya pemindahan lensa seperti yang dinyatakan dalam polisi. Adalah kerana sebab-sebab tersebut plaintif berhak menerima RM250,000 daripada defendan (lihat perenggan 70).

(11) Menurut s 73A Akta Keterangan 1950, mahkamah memutuskan bahawa DID-22 dan DID-21 tidak boleh diterima kerana pembuat dokumen-dokumen tersebut tidak dipanggil sebagai saksi (lihat perenggan 104).]

Notes

For cases on admissibility of hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1517–1519.

For a case on agency, defendant claiming, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 313.

For cases on formation of contracy of insurance, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 54–55.

For a case on insurance agent, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1088.
For a case on proof must be by maker, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1166.

Cases referred to

Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan [2001] 1 MLJ 227 (distd)
American International Assurance Co Ltd v See Ah Yu [1996] 3 CLJ 566 (distd)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615 (distd)
Balasingham v PP [1959] MLJ 193 (refd)
Bawden v London Edinburgh & Glasgow Assurance Co (1892) 2 QB 534 (refd)
Blanchette v CIS Ltd (1973) 36 DLR (3d) 561 (refd)
Brace Girdle v Oxley [1947] 1 KB 349 (refd)
China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52 (refd)
Dalip Singh v Durga Pd 1 A 442 (refd)
Girdharee v Modhoo 18 WR 323 (refd)
Goluck v Nund Mohan 12 WR 394 (refd)
Goluck v Nurrendra WR1864 (refd)
Kampilikakrivasavappa v Samasumud-diram 1 Mad HC 183 (refd)
Madhoosoodan v Suroop CH 4 MIA 431 (refd)
Mathura v Ram Ruchia 3 BLR ACJ 108, 112: 11 WR 482 (refd)
Meherban v Muhboob 7 WR 462 (refd)
Mohamed Hijazi v New India Assurance Co Ltd (1969) 1 African L Rev Comm 7 (refd)
Mohamed Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Mohidin v Muhammad 1 Mad HC 92 (refd)
Narayen v Motilal 1B 45 (refd)
National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195 (refd)
Newsholme Brothers v Road Transport and General Insurance Company, Limited [1929] 2 KB 356 (refd)
Ong Eng Chai v China Insurance Co Ltd [1974] 1 MLJ 82 (refd)
Purnima v Nityanunda BLR Sup vol 3 (refd)
Ram Sunder v Akima 8 WR 366 (refd)
STU v The Comptroller of Income Tax [1962] MLJ 220 (refd)
Sarat Sundari v Rajendra 9 WR 125 (refd)
Sheo Sahaye v Goodur 8 WR 328 (refd)
Stone v Reliance Mutual Insurance Society Ltd [1972] 1 Lloyd's Rep 469 (refd)
Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v Mercantile Insurance Sdn Bhd & Anor [1994] 1 CLJ 228 (refd)
Syarikat Uniweld Trading v The Asia Insurance Co Ltd [1996] 2 MLJ 160 (refd)
Tan Cheng Hock v Chan Thean Soo & Anor [1987] 2 MLJ 479 (refd)
Tan Kang Hua v Safety Insurance Co [1973] 1 MLJ 6 (refd)
Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd and another suit [2002] 1 MLJ 300 (refd)
Thakor Din v Nawab Syed 8 WR 341 (refd)
Toh Kim Lian & Anor v Asia Insurance Company Ltd [1996] 1 MLJ 149 (refd)
United Malayan Insurance Co Ltd v Lee Yoon Heng [1964] MLJ 453 (distd)
Wong Lang Hung v National Employees' Mutual General Insurance Association Lt [1972] 2 MLJ 191 (ditsd)

Legislation referred to
Evidence Act 1950 s 73A
Insurance Act 1963 ss 18E, 44A, 44B
Insurance Act 1971 74(1)

Abdul Malik Ishak J:

FACTS OF THE CASE

[1] The plaintiff by the name of Poh Siew Cheng (SPI) is a Singaporean and he has a shoe factory in Singapore. His wife owned a factory in Johor Bahru. Whilst the plaintiff was in his wife's factory in Johor Bahru, he was approached by an American International Assurance Co Ltd ('AIA') Insurance Agent by the name of Ng See Sun who kept on pestering him to purchase a personal accident policy. The plaintiff informed Ng See Sun that he already had a personal accident insurance cover in Singapore, but despite that, the said Ng See Sun kept on asking the plaintiff to purchase a policy in Malaysia. The first segment of the notes of evidence speak volumes. In its original text, it reads as follows (see pp 19–20 of the first segment of the notes of evidence):

> Ng See Sun datang untuk jual polisi tersebut kepada saya. Beliau datang ke tempat saya, kadang menunggu sekali dan selalu beliau suruh saya beli Personal Accident policy daripadanya dan selalu dia suruh saya beli dan akhirnya saya beli.
>
> Sebelum saya beli policy tersebut, saya ada bagitahu Ng See Sun bahawa saya juga ada insuran polisi di Singapura dan jawapan yang diberi oleh beliau adalah polisi di Singapura tidak ada kena mengena dengan polisi di Malaysia.
>
> Ng See Sun ada pujuk saya untuk beli Personal Accident policy tersebut.
>
> Saya bagitahu beliau saya sudah ada insuran polisi nyawa dan insuran policy personal accident di Singapura tetapi beliau masih pujuk saya untuk beli insuran ini.

Ng See Sun's persistence paid off. The plaintiff finally agreed and consented to purchase the personal accident policy in Malaysia. As an agent, Ng See Sun then took out a proposal form and started filling in the details. The plaintiff had all along disclosed the fact that he was suffering from diabetes and that he had life and personal accident policies in Singapore. But unfortunately, Ng See Sun in filling up the proposal form did not write down all these facts. The statement of claim, at paras 4 and 5, emphasised that the plaintiff had disclosed all the facts pertinent to the occasion at hand and these paragraphs were worded in this way:

> 4. The plaintiff had disclosed all the facts and data which were required under the terms and conditions of the said insurance policy to the agent of the defendant.
>
> 5. The plaintiff disclosed to the agent of the defendant in his application for the said insurance policy dated 16 May 1991 that he was suffering from Diabetes Mellitus, a fact which he had disclosed to the same Insurance Company at its office in Singapore in which he is a policy holder there.

[2] And when the plaintiff informed Ng See Sun of his diabetic condition, Ng See Sun nonchalantly replied (see p 20 of the first segment of the notes of evidence):

Kencing manis tidak ada kena mengena dengan Personal Accident Policy dan tempoh laku adalah setahun sahaja.

[3] The plaintiff also mentioned to Ng See Sun of the plaintiff's insurance policies in Singapore but Ng See Sun told the plaintiff that he (referring to Ng See Sun) did not require the details of the insurance policies in Singapore.

[4] When the plaintiff received his personal accident insurance policy, he realised that the details of his diabetic condition was not disclosed. The plaintiff's daughter by the name of Poh Lee Leng (SP 2) also called Ng See Sun and she was told by Ng See Sun that the diabetic condition of her father need not be written in the proposal form as it was a personal accident policy and not a life policy.

[5] On 6 September 1991, while the plaintiff was working he accidentally slipped and fell knocking onto the glass plate of a showcase shelf. As a result of the accident, the plaintiff suffered injury on his left eye (see the averments at paras 6 and 7 of the statement of claim). This accident happened at the plaintiff's shoe factory in Singapore — the Blue Star Shoes (see p 25 of the first segment of the notes of evidence). According to the plaintiff, no one saw the accident which occurred at approximately 9pm on that fateful day.

[6] For all these reasons, the plaintiff claimed for compensation arising out of that personal accident insurance policy from the defendant. The statement of claim contained these averments:

8. According to part 2 of the Benefits Schedule in the said insurance policy, the defendant is liable to pay compensation of RM250,000 or 50% of the value of the sum insured to the plaintiff.
9. Despite repeated demands made by the plaintiff and his solicitors, the defendant have failed and/or refused to pay the sum or any part of it.

Therefore, the plaintiff prays for orders:

(a) Amount of RM 250,000;
(b) Interest at the rate of 8% pa from the date of Judgment to the date of realisation;
(c) Costs; and
(d) Such and other reliefs.

NOMENCLATURE

[7] The plaintiff called five witnesses, namely:

(1) The plaintiff himself (SP1);
(2) The plaintiff's daughter Poh Lee Leng (SP2);
(3) Aw Joon Chuan (SP3);
(4) Dr Khoo Boo Kian (SP4); and
(5) Dr Chan Wing Kwong (SP5).

[8] The defendant, on the other hand, called two witnesses, namely:

(1) Cheong Onn Kee (SD1); and

(2) Leow Ah Looi (SD2).

[9] The notes of evidence came in three segments. The first segment of the notes of evidence covered the period from 2 May 1995 to 14 October 1997. The second segment of the notes of evidence covered the period from 16 December 1997 to 22 July 1999. Finally, the third segment of the notes of evidence covered the period from 18 April 2002 to 12 March 2003.

AGENCY

[10] An agent may make a contract for his principal which has the same consequences as if the principal has made it himself. In respect of the acts which the principal expressly or impliedly consents that the agent shall do on the principal's behalf, the agent is said to have the authority to act and it is this authority that constitutes the power to affect the principal's legal relations with third parties. This means that the fundamental rule that a person cannot be affected, either beneficially or adversely, by a contract to which he is not a party, is considerably diminished in its effect. In short, an agency agreement is an agreement by which the agent is authorised to establish privity of contract between the agent's employer known as the principal, and the third party. 'The essential characteristic of an agent is that he is invested with a legal power to alter his principal's legal relations with third parties; the principal is under a correlative liability to have his legal relations altered' (*Dowrick* 17 MLR 36, *Reynolds* 94 LQR 225).

[11] Thus, an agent employed by an insurance company to solicit business is, without a shadow of a doubt, an agent of the company and no one else. But the court in*Newsholme Brothers v Road Transport and General Insurance Company, Limited* [1929] 2 KB 356 was of a different view. There the court held that where the agent helped the insured to complete the proposal form, the agent acted as an agent for the insured. This meant that the insured will be liable for misrepresentation or non-disclosure in a situation where the insured has told the agent the truth but the agent recorded the insured's statement inaccurately in the proposal form. The decision in *Newsholme Brothers v Road Transport and General Insurance Company, Limited* has caused a great deal of heartache. It was rejected outright in Ghana as reflected in the case of *Mohamed Hijazi v New India Assurance Co Ltd* (1969) 1 African L Rev Comm. 7. It was reversed by way of a legislation in Jamaica — to be precise by s 74(1) of the Insurance Act 1971. In Malaysia too legislative intervention brought an end to the rigours of *Newsholme* and that was in the form of s 44A of the Insurance Act 1963. Even England proceeded to distinguish *Newsholme* restrictively as reflected in the case of *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469. Canada too followed suit as seen in the case of *Blanchette v CIS Ltd* (1973) 36 DLR (3d) 561.

SECTIONS 44A AND 44B OF THE INSURANCE ACT 1963

[12] In Malaysia as well as in Singapore there are still people who cannot read and write the English Language. That would also be true for the plaintiff, a Singaporean.

In purchasing the personal accident insurance policy, more often than not the insurance agent would fill up the proposal form. The unsatisfactory position in the past was that despite the disclosure to the insurance agent by the insured, yet the insurance agent failed to record the particulars of the disclosure in the proposal form and this had deprived the insured of the insured sum. This was the stand of the courts because the proposal forms were held to be the basis of the contract and any non-disclosure was considered as material thereby rendering the insurance contract to be null and void.

[13] On 1 April 1978, by an amending Act 432, all these changed. Parliament acted wisely by amending the Insurance Act 1963. Sections 44A and 44B were added to the Insurance Act 1963. Those two sections were worded as follows:

> Knowledge of and statement by authorised agent to be deemed knowledge and statement by insurer.
>
> 44A. (1) A person has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
>
> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of s 16A or any other provision of this Act by such person.
>
> (3) This section shall not apply –
>
> (a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or
>
> (b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.
>
> Application of other laws. Acts 125 and 136, F.M. 33/48, Sabah 3/58, Sarawak Cap 66.
>
> 44B (1) Where there is any conflict or inconsistency between the provisions of this Act and those of the Companies Act 1965, the Contracts Act 1950 and the Co-operative Societies Ordinance, the provisions of this Act shall prevail.

[14] Section 16A of the Insurance Act 1963 as alluded to in s 44A of the same Act enacts as follows:

> 16A. Misleading statement, promise, or forecast inducing person to enter into contract of insurance.
>
> Any person who by any statement, promise, or forecast which he knows to be misleading, false, or deceptive, or by any fraudulent concealment of a material fact, or by the reckless making (fraudulently or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive, induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurer shall be guilty of an offence

and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[15] Ian Chin J in *Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v Mercantile Insurance Sdn Bhd & Anor* [1994] 1 CLJ 228, rightly interpreted s 44A of the Insurance Act 1963 in this way:

> I take it that s. 44A of the Insurance Act 1963, has the effect of putting it out of reach of an insurer to set up as a defence the false answers in a proposal form when such answers were inserted by its authorised agent and when such answers were to the knowledge of its authorised agent false save where there was collusion or connivance and save where the person has ceased to be an agent of the insurer and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general of such cessation. What then is the meaning of the words 'authorised agent' appearing in s 44A of the Insurance Act 1963? The words 'authorised agent' have not been defined in either the Insurance Act 1963 or the Interpretation Act 1967. I am of the opinion that the words 'authorised agent' refer to an agent who has the actual, as distinct from apparent or ostensible, authority of the insurer because the section also speaks of the cessation of authority of the agent and there is no question of cessation of authority if there was no actual authority in the first place.

[16] In the Kuching High Court, Elizabeth M Chapman JC, in *Toh Kim Lian & Anor v Asia Insurance Company Ltd* [1996] 1 MLJ 149, had occasion to consider s 44A of the Insurance Act 1963 in the context of non-disclosure of material fact. The facts of that case may be stated as follows. On 19 August 1988, the deceased signed a proposal form when he took out a personal accident policy with the defendant insurer. The first policy lapsed on 19 August 1989 and there was no renewal certificate pursuant to condition 12 in the first policy. The second policy was valid from 24 August 1989 to 23 August 1990, but no proposal form was signed in relation to the second policy. The second policy stated that it was in lieu of and it replaced the first policy. The first policy was silent on the question of renewal. As a result of an accident on 23 April 1990, the deceased died. The first plaintiff as the administratrix of the deceased's estate and the second plaintiff as the beneficiary named in the insurance policy claimed the insurance monies from the defendant. The defendant repudiated liability and contended that the insurance policy was void ab initio because the deceased had not disclosed material facts in the proposal form, namely, the failure to disclose the deceased's history of diabetes mellitus and/or hypertension, and the failure to declare that the deceased was suffering from ischaemic heart disease. The defendant also contended that the proposal form formed the basis of the contract by virtue of the basis clause in the proposal form. The learned judicial commissioner allowed the plaintiffs' claims with costs. At p 155 of the report, this was what the learned judicial commissioner said:

> The defence contention is that the deceased did not disclose:
>
> (a) his history of diabetes.
>
> (b) his hypertension.
>
> (c) his ischaemic heart disease.
>
> The onus of proof of non-disclosure is on the defendants.

PW1, the widow of the deceased, testified that she knew the deceased was a diabetic and that he was on medication. As far as she knew, the deceased was not suffering from hypertension or ischaemic heart disease.

PW2, the insurance agent, testified she knew the deceased had diabetes and that she was the one who filled in the proposal form for the deceased. In the rejoinder, the defence alleges collusion between PW2 and the deceased. However, even at the time of the trial, PW2 was still the insurance agent of the defendants; her agency was never terminated.

DW3, Dr Lawrence Lee and DW6, Dr Majumder, both testified that the deceased himself volunteered the information that he had mild diabetes. It is obvious from the evidence adduced that the deceased did not try to hide anything. In the circumstances, s 44(A) of the Insurance Act 1963, applies and the defendants are deemed to have knowledge of the diabetic condition of the deceased: see *The 'Melanie' United Oriental Assurance Sdn Bhd Kuantan v MM Mazzarol* [1984] 1 MLJ 260.

[17] And at p 156 of the report, the learned judicial commissioner had this to say:

It is not disputed that the deceased died as a result of a road traffic accident. He did not die from diabetes, hypertension or ischaemic heart disease and there is evidence from the pathologist, DW2 that the deceased would have died even if he did not suffer from ischaemic heart disease.

The purpose of an accident policy is to insure the insured against bodily injury caused in an accident. The testimonies of PW2, the insurance agent, and DW1, the Assistant Manager of the defendant firm, both testified that for personal accident policies, no medical examination was required. If there is a duty to disclose material facts concerning the health of the deceased for the personal accident policy then this duty, in my opinion, should be confined to disclosure of serious illness or disease which would prevent the insured from leading a normal working life. The general principle in insurance law is that a fair and reasonable construction must be placed in the question on the proposal form: see *Pacific and Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249.

Diabetes and hypertension would not qualify in this category of serious illness or disease such as to prevent the insured from living a normal working life. Ischaemic heart disease may be such a serious illness but there is no evidence before this Court to show that the deceased actually suffered from the disease nor was there anything to show that he was aware he had such a condition when he took out the second policy. Furthermore, there was evidence to show that for personal accident policies no medical examination was required.

For the reasons given, I find that the defendants have not discharged their burden on a balance of probabilities that the deceased was guilty of non-disclosure of material facts which would entitle them to avoid the policy. There is nothing in the evidence to show that the deceased knew or had reason to believe he was suffering from hypertension or ischaemic heart disease when he signed the proposal form for the first policy and when he took out the second policy. As for the deceased's diabetic condition it is imputed on the defendants by law. Judgment is accordingly entered in favour of the plaintiffs in terms as prayed for in the statement of claim with costs unless agreed.

[18] In *Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160, I considered all the cases prior to the introduction of s 44A of the Insurance Act 1963 and those cases were:

(1) *United Malayan Insurance Co Ltd v Lee Yoon Heng* [1964] MLJ 453;

(2) *China Insurance Co Ltd v Ngau Ah Kau* [1972] 1 MLJ 52;

(3) *Wong Lang Hung v National Employees' Mutual General Insurance Association Ltd* [1972] 2 MLJ 191;

(4) *Tan Kang Hua v Safety Insurance Co* [1973] 1 MLJ 6;

(5) *National Insurance Co Ltd v S Joseph* [1973] 2 MLJ 195; and

(6) *Ong Eng Chai v China Insurance Co Ltd* [1974] 1 MLJ 82.

[19] That was a case emanating from the magistrate's court to the High Court at Johor Bahru by way of an appeal and I allowed the appeal. The headnotes carry the following narration of the facts and what was held by me (see pp 160–161 of the report):

> The appellant ran a workshop repairing and welding motor vehicles. One day, the respondent's agent convinced the appellant to take out insurance for the workshop with the respondent. The agent filled the proposal form as the appellant was not conversant in English. On 5 October 1988, a policy of insurance was issued. During the currency of the policy, a fire broke out as a result of accidental leakage of a gasoline gas pipe causing the destruction of a motor car which exhaust was under repair: The appellant compensated the owner in the sum of RM9,000 for the total wreck, and sought indemnity from the respondent. The respondent relied on the exemption clause which excluded liability ' … in respect of injury or damage caused by or in connection with or arising from fire …' although the policy expressly provided that the respondent would indemnify the appellant in respect of all sums which the appellant should become legally liable to pay for the compensation in respect of accidental damage to property belonging to third parties caused by the fault or negligence of the appellant or his employee. The appellant's business was clearly described in the policy as 'selling, fixing and welding exhaust, windscreen and radiator'. The agent knew that there was a possibility that the workshop might catch fire and it was common knowledge that the fixing or repairing of exhaust would involve welding. The magistrates' court dismissed the claim. The appellant appealed.
>
> **Held**, allowing the appeal:
>
> (1) An insurance policy should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application (see p 177E); *Martin (John) of London v Russell* [1960] 1 Lloyd's Rep 554 and *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyd's Rep 223 followed.
>
> (2) The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result such as to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy (see p 167E-G); *M'Cowan v Baine & Johnston & Ors* [1891] AC 401; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 and *Westminister Fire Office v Reliance Marine Insurance Co* (1903) TLR 668 followed.
>
> (3) In interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole. In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording could be resolved (see p 167H-I); *Kearney v General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240 and *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235 followed.

(4) It appeared that there was an ambiguity between the indemnity clause and the exemption clause, and applying the contra proferentum rule, the insurance policy should be construed in favour of the appellant insured (see p 171E); *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 followed.

(5) The agent was an authorised agent of the respondent insurer and whatever knowledge the agent had of the workshop, together with the knowledge that the appellant insured was not conversant in the English Language, must be deemed to be knowledge of the respondent insurer (see p 1761); *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 and *Bawden v London Edinburgh and Glassgow Assurance Co* [1892] 2 QB 534 (CA) distinguished.

(6) The issue of agency and the implications of 44A of the Insurance Act 1963 are matters outside the purview of the arbitrators. These are matters that should best be resolved by the courts — not the arbitrators; consequently, good grounds exist not to submit the dispute between the parties to arbitration and notwithstanding the arbitration clause in the insurance policy, the appellant insured was entitled to this action (see p 180F).

[20] In *Syarikat Uniweld Trading v The Asia Insurance Co Ltd*, I considered at length the case of Newsholme. I too considered the case of *Bawden v London Edinburgh & Glasgow Assurance Co* (1892) 2 QB 534 (CA) and this was what I said (see p 170 of the report):

> On the facts, the present appeal can easily be distinguished from *Newsholme* and *Bawden*. In *Newsholme*, the insurance agent was told the true facts by Newsholme but the insurance agent saw it fit to fill the proposal form incorrectly and Newsholme eventually signed the proposal form. In *Bawden*, the insurance agent knew that Bawden was an illiterate, unable to read and write but only able to write his name and had only one eye. At the dictation of Bawden, the insurance agent filled the proposal form which did not reveal that Bawden was already blind in one eye.

[21] Again, in *Syarikat Uniweld Trading v The Asia Insurance Co Ltd*, I considered ss 18E and 44A of the Insurance Act 1963 and this was what I said (see pp 175–177 of the report):

> Section 18E of the Insurance Act 1963, which was introduced by an amending Act 294 wef 1 June 1975, watered down the Newsholme situation to a little extent.
>
> That section reads as follows:
>
> 18E(1)
>
> Where any agent or servant of an insurer writes or fills in any particulars in a proposal for a home-service policy with the insurer, then, notwithstanding any agreement to the contrary between the proposer and the insurer, any policy issued in pursuance of the proposal shall not be avoided by reason only of any incorrect or untrue statement contained in any such particulars so written or filled in unless the incorrect or untrue statement was in fact made by the proposer to the agent or servant for the purposes of the proposal.
>
> (2) The burden of proving that any such statement was so made shall lie upon the insurer.
>
> (3) Nothing in this section shall be deemed to allow the avoidance of any policy for any reason or in any circumstances for or in which the policy could not have been avoided apart from the provisions of this section.

Now, s 18E of the Insurance Act 1963 relates and is confined to agents filling in proposal forms for a home-service policy. The First Schedule to the Insurance Act 1963 defines a home-service policy as:

> … a life policy in respect of which premiums are contracted to be paid at intervals of less than two months and are or have been ordinarily collected in the course of door-to-door collections made by persons employed for the purpose, but shall not include in relation to any insurer any description of policy which the Director-General directs is not to be treated as a home-service policy.

Another apparent laxity in s 18E of the Insurance Act 1963 relates to the possible line of argument by the insurer to the effect that the agent has no authority to fill in the proposal form on behalf of the insurer. With these shortcomings, it is not surprising that by an amending Act 432 that came into effect on 1 April 1978, s 44A to the Insurance Act 1963 was enacted. That section reads as follows:

> 44A
>
> (1) A person who has at any time been authorised as its agent by an insurer and who solicits or negotiates a contract of insurance in such capacity shall in every such instance be deemed for the purpose of the formation of the contract to be the agent of the insurer and the knowledge of such person relating to any matter relevant to the acceptance of the risk by the insurer shall be deemed to be the knowledge of the insurer.
>
> (2) Any statement made or any act done by any such person in his representative capacity shall be deemed, for the purpose of the formation of the contract, to be a statement made or act done by the insurer notwithstanding any contravention of section 16A or any other provision of this Act by such person.
>
> (3) This section shall not apply —
>
> (a) where there is collusion or connivance between such person and the proposer in the formation of the contract; or
>
> (b) where such person has ceased being its agent and the insurer has taken all reasonable steps to inform or bring to the knowledge of potential policy owners and the public in general the fact of such cessation.

At first glance, one is certainly impressed with the provisions of s44A of the Insurance Act 1963. It is worded better and wider than s 18E, and the pertinent differences can be categorised in this way:

(i) s 18E speaks of 'agent or servant of the insurer', whereas s 44A mentions 'any person who has at any time been authorised as its agent by an insurer' and such person is deemed to be the agent of the insurer for the purpose of the formation of the contract.

(ii) s 18E is confined to a home-service policy, whereas s 44A applies to all types of insurance policies.

(iii) s 18E talks of an agent filling in the proposal form whereas s 44A is couched in wider terms in that it speaks of an 'agent … who solicits or negotiates a contract of insurance …'. It appears s 44A would throw the net wider; it would envisage the situation where the authorised agent solicits or negotiates and then extend to the point of time when the authorised agent fills up the proposal form. The whole rigmarole before filling up the proposal form would be, and should be, considered under s 44A.

(iv) Newsholme lays down the proposition that the agent who helps the insured to fill up the proposal form is not the agent of the insurer, instead the agent assumes the capacity

of an agent for the insured. s 44A, on the other hand, deems the knowledge of the agent to be that of the insurer and it covers matters like the agent's knowledge of material facts, as well as those other facts made relevant for the formation of the contract.

(v) By virtue of s 44A(2), the insurers will have to monitor their agents closely.

From the available evidence, I hold that by virtue of s 44A of the Insurance Act 1963, the agent in the present appeal was an authorised agent of the respondent insurer and whatever knowledge the authorised agent had on the workshop, together with the knowledge that the appellant insured was not conversant in the English language, must be deemed to be the knowledge of the respondent insurer. Flowing from this, it is my judgment that there was a valid and binding contract of insurance between the appellant insured and the respondent insurer and, consequently, I hold, and it is my judgment, that the appellant insured should succeed in this appeal. It is obvious that the learned magistrate failed to adequately take into account that the agent was an authorised agent of the respondent insurer and whatever knowledge the authorised agent had must be deemed to be the knowledge of the respondent insurer by reference to s 44A of the Insurance Act 1963. Perhaps this oversight by the learned magistrate can be explained in that before him, s 44A of the Insurance Act 1963 was not adverted to at all. In fact, before me no arguments were advanced on ss 18E and 44A of the Insurance Act 1963. Be that as it may, in construing s 44A of the Insurance Act 1963, I am prepared to hold that an authorised agent of the insurer who solicits or negotiates a contract of insurance in such capacity for the formation of the contract must be given a wide scope of jurisdiction so as to cover not only explicit and expressed authority but also apparent or ostensible authority. Thus, if the insured allows an authorised agent to fill the proposal form for him, and the insured given the correct answers but the answers were falsely written down by the authorised agent for reasons best known to him, then the authorised agent remains throughout as the authorised agent of the insurer. This interpretation is in accord with the accepted canon of construction that a commercial document, like an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that the provisions of the insurance policy receive a fair and sensible application: *Hydarnes SS Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500 at p 504. But if the insured allows or requests the authorised agent to fill the proposal form for him and gives permission, whether oral or in writing, to the authorised agent to cough up with the answers to not only some but all the questions in the proposal form, the insured shall be deemed to have acquiesced in the falsification of the answers if he signs the proposal form. This is then said to be collusion or connivance between the authorised agent and the insured as envisaged in s 44A(3) (a) of the Insurance Act 1963. For these reasons, the first issue will have to be decided in favour of the appellant insured in that his loss was not excluded by the exception clause in the insurance policy.

[22] Now, in the context of the present case, I have no hesitation to hold and I accordingly hold, on the available evidence, that the plaintiff had disclosed the fact of him suffering from diabetes and also the fact that there were in existence several insurance policies in Singapore in his favour and such knowledge shall be deemed to be within the knowledge of the defendant pursuant to s 44A of the Insurance Act 1963.

[23] It must be borne in mind that the defendant is a company incorporated in Hong Kong with branches in Singapore and Malaysia. The fact that the plaintiff had disclosed his diabetic condition to the AIA branch in Singapore would be sufficient to constitute constructive notice to its branch in Malaysia, after all, the defendant is the same — namely, American International Assurance Co Ltd. With respect, the defendant's branches practice of not communicating with one another given the

current practice of an online computers stretching all over the globe is certainly difficult to believe and accept. The plaintiff is a Singaporean who has taken insurance coverages from the defendant in Singapore and when the plaintiff took the personal accident insurance policy in Johor Bahru — to be precise in Johor Jaya, Malaysia, the defendant should have been wary and be put on alert. It is not a sound commercial practice for a giant corporation like the defendant not to have a common on line computer system. The concept of constructive notice can also be imputed to the facts of the present case and when so imputed it can be shown that the defendant had such knowledge over and above that as provided for under s 44A of the Insurance Act 1963.

[24] Time and again, it was emphasised that the plaintiff had declared the fact that he is a diabetic with the AIA Singapore branch. And that such a declaration showed that there was no reason as to why the plaintiff should hide such a similar fact from the AIA Malaysian branch.

[25] Given the fact that the plaintiff had subsequently insured with QBE and that the plaintiff had disclosed his diabetic condition to the QBE's agent by the name of Aw Joon Chuan (SP3), there was no reason for the plaintiff not to make the same declaration to the AIA Malaysian branch. Aw Joon Chuan (SP3) testified and he confirmed that the plaintiff had disclosed that he was a diabetic. Not only that, according to Aw Joon Chuan (SP3), the plaintiff had also disclosed all the other insurance policies including the AIA policy in Malaysia which the plaintiff took and which is now the subject matter of the present suit. And, according to Aw Joon Chuan (SP3), he did not record all these in the proposal form of QBE.

[26] Aw Joon Chuan's (SP3's) evidence carried with it an element of truth and it weighed heavily in favour of the plaintiff. There was no reason to doubt that the plaintiff had consistently disclosed that he is a diabetic and that he had other insurance policies in Singapore. There was also no reason to doubt that the plaintiff had disclosed all these to the defendant's agent in the person of Ng See Sun.

[27] In my judgment, the evidence of the plaintiff (SP1) and that of his daughter (SP2) together with Aw Joon Chuan (SP3) spoke volumes for the plaintiff in the present suit. It was argued by the learned counsel for the defendant that the plaintiff should have called Ng See Sun as his witness in order to bolster up his case. It was pointed out that the plaintiff had testified that after his daughter (SP2) had called Ng See Sun and enquired about the lack of answer on diabetes, Ng See Sun replied that it was not necessary to incorporate them. The plaintiff also testified that Ng See Sun had informed him that the particulars of the insurance policies in Singapore were not needed either. These pieces of evidence were said to be inadmissible as they were hearsay.

[28] Again, it was pointed out that the plaintiff had testified that he obtained a copy of the application form approximately three (3) weeks thereafter. According to the plaintiff he merely signed in Chinese characters all the particulars filled up by Ng See Sun in the application form. It was submitted by the learned counsel for the defendant that these pieces of evidence were not believable for the following reasons:

that if, as the plaintiff claimed, Ng See Sun had already told the plaintiff when filling up the application form that the insurance policies in Singapore – referring to exhs P11, D15 and D16, and the plaintiff's diabetes had nothing to do with the personal accident insurance policy which the plaintiff was applying for, then why was there a need for the telephone calls to be made to Ng See Sun in order to find out why the said information were not included in the application form? With respect, the calls made by the plaintiff's daughter to Ng See Sun were perfectly natural. It was the concern expressed by the plaintiff's daughter after seeing the insurance policy in exh P1. This was borne out by the testimony of the plaintiff's daughter. At p 85 of the first segment of the notes of evidence, the plaintiff's daughter (SP2) testified in these words:

> My father wanted me to keep the policy P1. My father gave me P1 and I realised that my father's ailment — suffering from diabetes was not recorded in P1. I immediately obtained the phone number of Mr Ng Sun See Sun from my father and I called Mr Ng See Sun and enquired why the detail about my father's diabetic problem was not stated in the policy. Mr Ng See Sun told me that it was not necessary to write that detail down as it is a personal accident policy and not a life insurance policy.

[29] A competent witness is a witness who may be called to give evidence. A compellable witness who refuses to testify will be in contempt of court and he faces the penalty of imprisonment, if the need arises. But a compellable witness may be entitled, on grounds of public policy or privilege, to refuse to answer the questions that are put to him.

[30] Anyone is competent to be a witness. And all competent witnesses are compellable to give evidence.

[31] Of pertinence to note is this. That no particular number of witnesses is necessary to prove or disapprove a fact. Thus, the testimony of a single witness, if believed, is sufficient to establish any fact. It is said that the evidence is to be weighed and not counted. And that there is no rule of law which says that the uncorrobated testimony of a witness cannot be accepted.

[32] If a single witness is entitled to full credit and is to be believed, it is sufficient for the court to make a decision. From my experience, there have been occasions where a single witness is more trustworthy than the testimony of five persons who swear against him. The court is always concerned about the quality of the evidence and not the quantity. It is the duty of the court to separate the truth from the falsehood. Of course, there are many advantages where there is a plurality of witnesses. Foremost would be the opportunity to weigh the evidence and to find out the discrepancies between the different versions that were given. However, it would be unwise and against public policy if the court insists on the production of more witnesses than one.

[33] So, applying all these trite general principles, I must now consider the evidence of the plaintiff and that of his witnesses together with the evidence of the defendant in its entirely in order to come to a just decision. I must categorically hold

and it was part and parcel of my judgment that I believed the evidence of the plaintiff. I too believed the evidence of the plaintiff's daughter.

[34] Under cross-examination, the plaintiff agreed that he had made the declaration in the basis clause. The plaintiff then said that he did not know that the answers in the application form were important. The plaintiff agreed to the suggestion that the agent filled up the answers based on the information given by him but maintained that the agent did not fill up the information on diabetes. The plaintiff testified that the agent persuaded him to buy the insurance policy. The plaintiff said at p 49 of the first segment of the notes of evidence:

> Agent itu paksa saya beli.
>
> Agent itu keep(s) telling me to buy.

[35] To a suggestion that the plaintiff signed exh D14, the plaintiff had this to say (see p 50 of the first segment of the notes of evidence):

> Saya sign kerana dia kata maklumat-maklumat ini tidak penting cuma comply with the rules. Apa yang saya perlu adalah untuk menyerah salinannya kepada pejabatnya.

[36] Under re-examination, the plaintiff said that he can't contact Mr Ng See Sun. He said that p 3 of bundle 'B' was filled by Mr Ng See Sun. When he was asked to elaborate further, this was what he said (see p 79 of the first segment of the notes of evidence):

> At first Ng asked me to fill the form as at p 3 of bundle 'B' and I told him that I could not do so as I don't know how to fill the form. Then he asked me whether I was suffering from any disease and I told him that I was perfectly OK except that I had diabetes.

[37] I will now allude to the evidence of the plaintiff's daughter (SP2). She testified that about two or three weeks after her father took the insurance policy in exh P1 (at pp 1 to 9 of bundle 'B') she came to know of it and her father wanted her to keep the policy. When her father gave the insurance policy to her she realised that her father's diabetes was not stated therein. She then immediately obtained Ng See Sun's telephone number from her father and she called Ng See Sun to inquire why her father's diabetes was not stated in the insurance policy. She testified that Ng See Sun told her that it was not necessary to do so as it was a personal accident policy and not a life policy (this piece of evidence was said by the learned counsel for the defendant to be inadmissible as being hearsay). According to the plaintiff's daughter, she even called the QBE's agent by the name of Aw Joon Chuan (SP3) and asked the same question. She testified that Aw Joon Chuan (SP3) gave her the same answer (this evidence was said to be inadmissible hearsay).

[38] The plaintiff's daughter (SP2) was cross-examined and the learned counsel for the defendant addressed the court in regard to the inconsistencies in her evidence. These inconsistencies did not detract from the fact that she did call Ng See Sun and

Aw Joon Chuan (SP3) in regard to the need to disclose her father's diabetic condition in the proposal form. At p 90 of the first segment of the notes of evidence, the plaintiff's daughter (SP2) testified:

> I called Mr Aw in relation to AIA's insurance policy especially about the diabetic policy. But I agree Mr Aw is an agent for QBE and that he is not an agent for AIA. I have to ensure from Mr Ng whether the AIA policy was correct.

[39] She further testified as follows (see p 97 of the first segment of the notes of evidence):

> Mr Ng is a qualified agent for AIA. If not we should not sign the agreement and pay the premium to him at all.

[40] Continuing at the same page, this was what she said:

> We trusted agent Ng. Whatever he said must be correct because he's a qualified agent for AIA.

[41] These pieces of evidence showed that Ng See Sun was informed of the plaintiff's diabetes when he was filling the proposal form for the plaintiff. Ng See Sun was also informed as alluded to in the early part of this judgment of the plaintiff's pre-existing policies in exhs P11, D15 and D16.

[42] Reverting back to the evidence of the plaintiff, there was much fuss in regard to the first segment of the notes of evidence at p 45 especially to the question of whether the plaintiff would call Ng See Sun as a witness. To this question, the plaintiff ventured the following answer:

> Saya bersedia.

[43] The plaintiff was recalled at a later stage in order to identify Ng See Sun (see pp 23 and 24 of the second segment of the notes of evidence). So, Ng See Sun was called into the court and the plaintiff identified him. At this juncture, the learned counsel for the defendant put on record that Ng See Sun was subpoenaed by the plaintiff and was perfectly available for examination and yet the plaintiff did not wish to call him as a witness. The learned counsel for the defendant submitted by way of a contrast that Aw Joon Chuan (SP3) was previously identified by the plaintiff in court (see p 33 of the first segment of the notes of evidence) and he was subsequently called as a witness.

[44] It was the submission of the learned counsel for the defendant that the plaintiff should call Ng See Sun as his witness because the burden of proof lies with the plaintiff as per s 103 of the Evidence Act 1950. Now, the pertinent question to pose would be this: should the plaintiff call Ng See Sun, the agent of the defendant, to the stand to support his case? In my judgment, if the plaintiff were to call the

defendant's agent in the person of Ng See Sun, this court would readily construe that there is collusion between the plaintiff and the defendant's agent. Section 103 of the Evidence Act 1950 enacts as follows:

> 103. Burden of proof as to particular fact.
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ILLUSTRATIONS
>
> (a) A. prosecutes B. for theft and wishes the court to believe that B. admitted the theft to C. A. must prove the admission.
>
> (a) B. wishes the court to believe that at the time in question he was elsewhere. He must prove it.
>
> Saya bersedia.

[45] It simply means that he who asserts must prove. So if a person wishes the court to believe in the existence of a particular fact, the onus of proving that fact is on that person, unless the burden of proving it is cast by any law on any particular person (*Mohamed Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, at p 171 (SC)). In a case of theft or of receiving stolen property, although the main burden of proof is throughout on the prosecution, yet if the accused sets up a defence that he had innocently purchased it from the market or from a particular person, the accused must prove it. By way of a comparison there is section 101 of the Evidence Act 1950 which requires proof of all the facts which a person alleges so that that person may have judgment in his favour. Whereas section 103 of the Evidence Act 1950 provides for the proof of particular facts only.

[46] In the context of the present case, the defendant suggested that the evidence of the plaintiff in relation to what had transpired between the plaintiff and Ng See Sun was hearsay because Ng See Sun was not called by the plaintiff to testify. The defendant even had the audacity to say that the telephone conversation between the plaintiff's daughter by the name of Poh Lee Leng (SP2) was also inadmissible as it flouted the rule against hearsay in that Ng See Sun was not called as a witness by the plaintiff. Now, in proving the plaintiff's case, the plaintiff called his daughter to the stand and she adduced evidence about her telephone conversation with Ng See Sun which showed that there was no necessity to incorporate in the proposal form about the plaintiff's diabetic condition because the plaintiff was taking a personal accident policy and not a life policy. Even Aw Joon Chuan (SP3) who testified for the plaintiff confirmed the same fact. The plaintiff also testified that it was Ng See Sun who had informed him that the particulars of his insurance policies in Singapore were not needed to be incorporated into the proposal form. It must be borne in mind that, firstly, Ng See Sun was and is an agent of the defendant and it was he who filled the proposal form. Secondly, being an agent of the defendant, the defendant should be the one who should be calling Ng See Sun, after all, the latter was and is still the defendant's employee. Thirdly, why should the plaintiff risk calling Ng See Sun as his witness bearing in mind that Ng See Sun may turn turtle and, of crucial importance, this court would even construe Ng See Sun to be in collusion with the plaintiff and

thereby the weight to be attached to Ng See Sun's evidence would be minimal. At any rate, as I said earlier, s 44A of the Insurance Act 1963 should be invoked in favour of the plaintiff.

[47] The evidence of the plaintiff was based on what he told Ng See Sun and what Ng See Sun told him in return. The same would also be true for the evidence of the plaintiff's daughter. That being the case, the evidence of the plaintiff as well as that of his daughter were the direct evidence of what they heard from Ng See Sun. Both of them came to court and testified as to what they had heard. How can that be hearsay?

[48] Section 59 of the Evidence Act 1950 enacts as follows:

> 59. Proof of facts by oral evidence.
>
> All facts, except the contents of documents, may be proved by oral evidence.

[49] According to s 3 of the Evidence Act 1950, the phrase 'oral evidence' means 'all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry.' In order to give an oral evidence, the witness must testify on oath in open court and offer as evidence of the truth of that which is asserted. It is a direct testimony in that the witness comes to court and gives his evidence as to what he perceives as a fact in issue, relevant fact or collateral fact with one of his five senses. According to Denning J (as he then was) in *Brace Girdle v Oxley* [1947] 1 KB 349, at p 358:

> Primary facts are facts which are observed by the witnesses and proved by testimony.

[50] In the absence of documentary evidence, oral evidence is sufficient to prove a fact. This was the approach adopted by Tan Ah Tah J, (as he then was) in *STU v The Comptroller of Income Tax* [1962] MLJ 220, at p 221:

> In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it, however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit, does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted.

[51] Applying the last passage of what Tan Ah Tah, J, (as he then was) in the case of *STU v The Comptroller of Income Tax* to the facts of the present case, it can be said that the testimony of the plaintiff was certainly 'worthy of credit' and there was 'nothing improbable' about it. The same would also be true for the testimony of the plaintiff's daughter (SP2). Moreover, the evidential value of oral evidence can never be doubted. Of course, the weight and value of an oral evidence depends largely on its credibility as found by the court (*Balasingham v Public Prosecutor* [1959] MLJ 193). The best evidence must always be given. Thus, all facts except the contents of documents may be proved by oral evidence. It does not always mean that oral

A evidence must be in verbal form. At times, it may include signs made by persons who are unable to speak on account of illness or physical injury.

[52] Credible oral evidence would be legally sufficient to prove:

(1) a prescriptive title (*Meherban v Muhboob* 7 WR 462); or

B

(2) the fact of possession (*Sheo Sahaye v Goodur* 8 WR 328; *Thakor Din v Nawab Syed* 8 WR 341); or

(3) even the title itself (*Ram Sunder v Akima* 8 WR 366; Girdharee v Modhoo 18 WR 323); or

C

(4) the boundaries (*Sarat Sundari v Rajendra* 9 WR 125; *Goluck v Nurrendra WR* 1864); or

(5) the existence of an agreement pertaining to a farming lease (*Goluck v Nund Mohan* 12 WR 394); or

D

(6) to show the adjustment of accounts (*Purnima v Nityanunda* BLR Sup vol 3 FB; *Kampilikakrivasavappa v Samasumud-diram* 1 Mad HC 183); or

(7) the pedigree (*Mohidin v Muhammad* 1 Mad HC 92);

(8) the payment of money due upon a mortgage – bond even though the written receipt was not produced (*Dalip Singh v Durga Pd* 1 A 442); or

E

(9) the payment of a bond debt even if there is in existence a clause to say that all payments are to be entered on the back of the bond (*Narayen v Motilal* 1B 45).

[53] Considerable assistance can be obtained in weighing the oral evidence by having regard to the following considerations:

F

(a) the bearing or the demeanour of the witness;

(b) the intellectual capacity of the witness;

(c) the station in life of the witness and his interestedness;

G

(d) the motives, if any, of the witness;

(e) the consistency of the testimony of the witness;

(f) the discrepancies in material particulars of the evidence of the witness;

(g) the probabilities of the case when examining the evidence of the witness;

H

(h) the necessity of corroboration in cases involving accomplice evidence, confession of a co-accused, etc; and

(i) the effect of presumptions.

I

[54] The list of considerations as stated above cannot be said to be closed. So in dealing with an oral evidence, one must take cognizant of the probabilities, presumptions, surrounding circumstances of the whole case. According to Edgar Joseph Jr J (as he then was) in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479, in arriving at a finding as to credibility the demeanour of the witness has to be balanced and weighed against the rest of the evidence and the probabilities of

the case. His Lordship in that case referred to a book written by MacKenna J entitled *The Judge* (1969) at p 63 and his Lordship reproduced passages from that book and I gratefully would follow suit. This was what MacKenna J said in his book so quoted by his Lordship Edgar Joseph Jr J (as he then was) in *Tan Cheng Hock*:

> I question whether the respect given to our finding of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitatingly. Is that the mark of a cautious man whose statements are for that reason to be respected or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.

[55] In India, the value of oral evidence is highly suspect. In *Madhoosoodan v Suroop* CH 4 MIA 431, 7 WR.63, the court observed:

> It is quite true that such is the lamentable disregard of truth prevailing amongst the inhabitants of Hindustan that all evidence is necessarily received with great suspicion; but we must be careful not to carry caution to an extreme length nor utterly to discard oral evidence merely because it is oral and unless the impeaching and discrediting circumstances are clearly found to exist.

[56] Mitter J in *Mathura v Ram Ruchia* 3 BLR ACJ 108, 112: 11 WR 482, aptly said:

> Although in dealing with such (oral) evidence we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact, in which there is not a conflict of testimony; one set of witnesses swearing point-blank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposed to it. If therefore, we were to form our conclusions upon the bare depositions of witnesses, without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hope of success in discovering the truth must be at an end.

[57] Fortunately, in Malaysia, the courts are still receptive of oral evidence of the witnesses. There is no general distrust of the oral testimony of a witness. In Malaysia there is no rule of law that all oral evidence must be discarded. On the contrary, justice can never be administered without recourse to oral evidence. In the context of the present case, I was and am receptive of the evidence led orally through the plaintiff and that of the plaintiff's daughter.

[58] I shall now refer to s 60 of the Evidence Act 1950 which enacts as follows:

> 60 Oral evidence must be direct
>
> (1) Oral evidence shall in all cases whatever be direct, that is to say —
>
> (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

(2) the opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing [including] a document, the court may, if it thinks fit, require the production of that material thing (or other document) for its inspection.

[59] And based on the evidence of the plaintiff it simply meant that the plaintiff heard what Ng See Sun had said. The plaintiff heard it directly, just like an eye witness, and he now testified based on what he had heard. It was and it is in the nature of a direct evidence and it is admissible. It certainly cannot be hearsay. The same would be true for the oral evidence of the plaintiff's daughter. In the context of the present case, s 60(1)(b) of the Evidence Act 1950 must be applied vigorously in favour of the plaintiff.

[60] Evidence is direct when it goes straight to establish the main fact in issue. Thus, if the fact to be proved could be seen, heard, touched, tasted or smelt, then the testimony of the witness should be of one who actually saw it, heard it, touched it, tasted it or smelt it. In short, the testimony of the witness must be of the person who perceived the fact through the medium of that person's own senses (see 15 *Halsbury's Laws of England* (3rd Ed), para 486). For example, in order to prove the offence of an assembly, what the witness actually saw and heard would be admissible but that witness's opinion and his impression that the assembly appeared to be unlawful is not admissible. And if the evidence refers to an opinion or to the grounds thereto then the testimony must be of the person who holds that opinion. It must be borne in mind that the testimony of a witness who says that he has heard another person express a particular opinion is not admissible.

[61] Section 60 of the Evidence Act 1950 relates to the rule against hearsay. It deals with the rejection of evidence which is not direct and what is known as hearsay evidence. What is hearsay is not admissible. Here, we have the following situations. The plaintiff personally spoke to and heard what Ng See Sun had said. The plaintiff's daughter (SP2) spoke over the telephone and heard what Ng See Sun had said. That surely cannot be secondhand or hearsay. Both of them came to court and testified under oath. That was a direct oral evidence at its best.

[62] The defendant was concerned about the material non-disclosures by the plaintiff but by virtue of s 44A of the Insurance Act 1963 the knowledge on the part of the agent Ng See Sun is deemed to be the knowledge of the insurer defendant and,

consequently, all the alleged material non-disclosures are now deemed to have been disclosed. At any rate, according to the case of *Toh Kim Lian*, diabetes need not be disclosed in personal accident policies because it is not a serious illness or disease which would prevent the insured from leading a normal working life. Of pertinence would be exhs P33A, P33B, P33C and P33D which categorically show that the proposal form for personal accident policy does not require disclosure of any diabetic condition and the existence of other insurance policies are also not material. In fact, there is no requirement of any medical examination at all.

THE BASIS CLAUSE

[63] The defendant vigorously argued that there was a basis clause or a warranty clause in the insurance contract in exh P1 (at pp 1 to 9 of bundle 'B') whereby the truthfulness of the answers given by the plaintiff in the proposal form was warranted by the plaintiff and made the basis of the contract. The law of basis clause in Malaysia is well settled in that where there is such a clause, the parties have thereby agreed that the truthfulness of the answers is the basis of the contract and, therefore, it is the condition precedent to the very existence of the contract. The following authorities were relied upon by the defendant for that proposition of the law:

(1) (1) China Insurance Co Ltd v Ngau Ah Kau [1972] 1 MLJ 52, FC;

(2) (2) Wong Lang Hung v National Employees' Mutual General Insurance Association Ltd [1972] 2 MLJ 191, HC Sibu;

(3) (3) National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195, HC Kuala Lumpur;

(4) (4) Ong Eng Chai v China Insurance Co Ltd [1974] 1 MLJ 82, HC Kuala Lumpur;

(5) (5) Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC Muar;

(6) (6) American International Assurance Co Ltd v See Ah Yu [1996] 3 CLJ 566, HC Kuantan;

(7) (7) Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan [2001] 1 CLJ 476, HC Kuala Lumpur;

(8) (8) United Malayan Insurance Co Ltd v Lee Yoon Heng [1964] MLJ 453, HC Kuala Lumpur; and

(9) (9) Teck Liong (EM) Sdn Bhd v Hong Leong Assurance Sdn Bhd and another suit [2002] 1 MLJ 300, HC Kuala Lumpur.

[64] But, with respect, all these authorities were decided not with s 44A of the Insurance Act 1963 in mind. It must be borne in mind that Parliament introduced s 44A of the Insurance Act 1963 on 1 April 1978. It was pointless to argue that the plaintiff had breached the basis clause and therefore the insurance policy was null and void. I believed the evidence of the plaintiff. I too believed the evidence of the plaintiff's daughter. It was part and parcel of my judgment that there was no breach of the basis clause. It was Ng See Sun's misdeeds in not incorporating the plaintiff's

diabetic condition and the insurance coverages which the plaintiff took in Singapore. The oral testimonies of both the plaintiff and his daughter were worthy of credit and they were accepted by me accordingly. There was nothing improbable about their versions as to what actually happened. I accepted their versions as being the direct evidence of the case at hand.

[65] The evidence showed that the plaintiff sustained a bodily injury and he too suffered permanent total loss of the lens of one eye. Dr Khoo Boo Kian's (SP4's) evidence was based on the medical record available before him (hereinafter he is referred to as 'Dr Khoo (SP4)'). There was evidence to show that Dr Khoo (SP4) did examine the plaintiff. At p 128 of the first segment of the notes of evidence, this was what Dr Khoo (SP4) testified:

> The patient can count fingers with his left eye and at close range. Anything more than one foot from the left eye patient could not see.
>
> There is no lens in the left eye because the lens was damaged during the injury and was removed at surgery.
>
> The left eye has very poor vision.
>
> There is no point in replacing the lens because it will not improve his vision. This is because the patient has sustained injury to his cornea as well as to his retina. There is no lens to the eye now.
>
> There was a need to remove the damaged lens. It was necessary because it would have adversely affected the left eye if left in the left eye.
>
> According to the records (P9) the earliest mention of diabetic was on the 3 October 1991 on a medical certificate signed by Dr Chan Wing Kwong.

[66] Dr Khoo (SP4) continued with his testimony. He was asked this question at p 129 of the first segment of the notes of evidence:

> Question: Could the patient like the plaintiff who has suffered this kind of accident could have sustained this kind of eye injury if he was not a diabetic?

[67] And he gave the following answers (see p 129 of the first segment of the notes of evidence):

> Answer: The patient has severe injury to his left eye with a corneal laceration, severe corneal scarring and loss of the lens. This would have caused impairment of vision even in a patient who is not a diabetic.
>
> I can identify the plaintiff who is known as Mr Poh Siew Cheng and he is in court today. There he is.
>
> (Witness points to the plaintiff and identifies him).
>
> The plaintiff's eye sight would have deteriorated to this level even if he was not a diabetic.

At p 15 of the second segment of the notes of evidence, Dr Khoo (SP4) confirmed that despite diabetes mellitus affecting the eye sight, cataract would be more common in patients with diabetes mellitus. This was what the good doctor said:

> The patient had a cataract on the left eye and Dr Chan wrote that it was a cataract caused by trauma. There was no cataract in the right eye.

[68] And at p 20 of the second segment of the notes of evidence, Dr Khoo (SP4) testified as follows:

> Usually diabetes would affect both eyes equally. In this case, the plaintiff still has good vision of 6/6 in the right eye hence unlikely that the usual loss in the left eye is due to the diabetes.

[69] Dr Chan Wing Kwong (SP5), is the eye specialist who conducted the surgery. He confirmed at p 28 of the second segment of the notes of evidence that even if the plaintiff is not a diabetic, the plaintiff 'could have sustained the same injuries.' And at p 30 of the second segment of the notes of evidence, Dr Chan Wing Kwong (SP5) confirmed that the lens was removed during surgery. At p 38 of the second segment of the notes of evidence, Dr Chan Wing Kwong (SP5) testified and he confirmed that the cataract was a traumatic cataract and not a pre-existing cataract. In his own words, this was what he said.

> No. I meant I can tell by examination the difference between a traumatic cataract and a pre-existing cataract for example caused by diabetes.

[70] With such clear evidence emanating from these two doctors, it was not wrong to say that the accident was the direct and independent cause of the removal of the lens. The plaintiff suffered a permanent total loss of the lens of the left eye and he was therefore entitled to the sum of RM 250,000 — being 50% of the insured sum. In fact, the plaintiff has suffered nearly actual total loss of one eye sight as he can only see light and shadows with his left eye. Under the insurance policy, the plaintiff could claim for 100% of loss of one eye sight amounting to RM500,000 but since the plaintiff can see light in his left eye and in layman's term he is not blind, the plaintiff now seeks for the sum of RM250,000 being for loss of lens of one eye.

[71] The testimonies of Dr Khoo (SP4) and Dr Chan Wing Kwong (SP5) (hereinafter referred to as 'Dr Chan (SP5)') were criticised by the defendant but that did not detract from the fact that these two good doctors had indeed examined the plaintiff and arrived at their own conclusions.

[72] It must be recalled that Dr Khoo (SP4) testified that he only examined the plaintiff on September 1997 for an assessment of the plaintiff's eye condition. That was the first time Dr Khoo (SP4) met the plaintiff and the doctor had never examined the plaintiff at any point of time before that. It was pointed out that Dr Khoo (SP4) did not have personal knowledge of the plaintiff's pre-existing conditions and the previous treatments received by the plaintiff. Dr Khoo (SP4) only relied on the medical records of the plaintiff. It was emphasised that Dr Khoo (SP4) did not know whether the plaintiff had received any treatment to the left eye before September 1991 and that Dr Khoo (SP4) was not in charge of the records in Tan Tock Seng Hospital. It was submitted that it was wrong and unprofessional for Dr Khoo (SP4) to declare in exh P7 (see pp 6 and 7 of bundle 'C') on 21 April 1992 that:

I hereby certify that I have personally examined and treated the patient for his/her injuries described above and that the facts as stated above represent my medical opinion of his/her condition.

[73] It was submitted that Dr Khoo (SP4) ought to have qualified his statement by stating that he was only relying on the relevant records in respect of the plaintiff when he was signing exh P7. It was submitted that the same argument would apply in regard to the certification dated 13 May 1992 as seen in exh P5. But it must not be forgotten that Dr Khoo (SP4) had in exh P7 mentioned Dr Chan (SP5) and another doctor and that would give credence to exh P7.

[74] It was pointed out that Dr Khoo (SP4) did not perform any active treatment on the plaintiff such as laser treatment or surgery on 8 September 1997 and he merely put the plaintiff on the slit lamp microscope and performed an ultra-sound examination of the plaintiff's left eye and these were said not to be considered as active treatment. It was submitted that based on exh P13 (see pp 19 and 21 of bundle 'C'), as at 2 March 1988 the plaintiff had severe diabetes which was the same as diabetes mellitus and that the plaintiff had diabetes since two years previously (see pp 12 and 13 of the second segment of the notes of evidence). But it must not be forgotten that the plaintiff's injury was severe and that it would have caused a loss of vision even if the plaintiff was not a diabetic and that the plaintiff's cataract in the left eye was removed by Dr Chan (SP5) surgically (see pp 13 and 14 of the second segment of the notes of evidence). According to Dr Khoo (SP4) cataract occurred more frequently when the patient had diabetes and of a younger age and this would usually affect both eyes equally. Diabetes mellitus could affect the health of the retina and that would sometimes impair the vision. Patients with diabetes were more prone to cataracts and blockage of blood vessels that fed the eyes. Diabetes mellitus affected the eyesight and cataract would be more common in patients with diabetes mellitus (see pp 14 and 15 of the second segment of the notes of evidence). It was submitted that since Dr Khoo (SP4) did not treat the plaintiff for the alleged accident, the said doctor was not in the position to say what actually caused the cataract in 1991 and that the said doctor had only the records of the plaintiff to go by. In his professional judgment, Dr Khoo (SP4) was of the opinion that it was possible that the cataract was affected to a certain extent by the diabetes mellitus but it was unlikely. Dr Khoo (SP4) agreed that it would be appropriate for Dr Chan (SP5) to testify on this point since it was Dr Chan (SP5) who had examined the plaintiff. When Dr Khoo (SP4) examined the plaintiff on 8 September 1997, the plaintiff's right eye was also affected by diabetes although it was not severe enough to cause a loss of vision and there was no cataract then in the right eye. According to Dr Khoo (SP4) the strength of the plaintiff's right eye in September 1997 was 6/6 which was a good vision (see pp 16 and 20 of the second segment of the notes of evidence).

[75] It must be recalled that Dr Chan (SP5) examined the plaintiff on 6 September 1991 and he treated the plaintiff on 7 September 1991. At that time Dr Chan (SP5) was a new eye-specialist and not an experienced one and he had just been out on training for six (6) months after acquiring his first graduate qualification. Dr Chan (SP5) treated the plaintiff for the first time only on 6 September 1991 and not at any point previously. Dr Chan (SP5) therefore, so it was submitted, had no knowledge

whatsoever about the plaintiff's medical history prior to 6 September 1991. When Dr Chan (SP5) treated the plaintiff on 7 September 1991 the plaintiff gave him a history of falling down and hitting the left eye against a glass shelf. The plaintiff sustained in the left eye, a corneal laceration and a traumatic cataract. An emergency surgery was done to repair the corneal laceration and to remove the cataract in the left eye. The plaintiff developed a densed corneal scar in the left eye and a state of aphakia – the absence of natural lens which were removed during the surgery. The plaintiff sustained a permanent decrease in his vision acuity and the best he could do was to count his fingers at close range meaning one to two feet (see pp 27, 28 and 30 of the second segment of the notes of evidence). The plaintiff was therefore considered to have some vision and was not blind in layman's terms (see pp 30 and 31 of the second segment of the notes of evidence). That was the reason as to why the plaintiff was seeking for the sum of RM250,000. Dr Chan (SP5) testified that the plaintiff could have sustained the same injuries, the same impairment of vision and deterioration of eyesight even if he was not a diabetic (see pp 28 and 29 of the second segment of the notes of evidence).

[76] The learned counsel for the defendant made the following deductions based on the available documents. He deduced that from exh P13 (see pp 19 and 21 of bundle 'C') that the plaintiff had diabetes from March 1986 — which was approximately 5½ years prior to the accident. He also deduced that as at March 1988, the plaintiff had severe diabetes — which was approximately 3 ½ years prior to the accident, the plaintiff had had diabetes mellitus. He also deduced that the plaintiff's diabetes was severe as it was not treated as stated in exh P13 (see pp 19 and 21 of bundle 'C'). Incidentally, DrChan (SP5) did not know whether the plaintiff had received any treatment at all for the diabetes mellitus from 25 March 88 to 6 September 1991 (see p 33 of the second segment of the notes of evidence).

[77] Dr Chan (SP5) also testified that a severe and uncontrolled diabetes would affect one's eyesight by a process called diabetic retinopathy, which was a disease affecting the retina of a diabetic person. A prolonged and untreated diabetes could cause a leakage of protein and blood from the retinal vessels. It could also cause haemorrhage of the retina resulting in visual impairment and in severe cases blindness. Therefore, according to Dr Chan (SP5) an untreated diabetes mellitus could lead to blindness (see p 34 of the second segment of the notes of evidence).

[78] Dr Chan (SP5) further testified that when the retina was affected by diabetes, the lens would also be affected and in some cases a cataract could develop. Prior to 6 September 1991, Dr Chan (SP5) had no knowledge whatsoever of the state of the plaintiff's left eye and without that knowledge, Dr Chan (SP5) was not in a position to tell how the diabetes mellitus affected the eyesight. Dr Chan (SP5) also had no personal knowledge of the alleged accident related by the plaintiff to him on 6 September 1991 (see p 35 of the second segment of the notes of evidence). The second segment of the notes of evidence at pp 35–36 carried the following exchanges:

Q: In severe cases of diabetes which have affected the lens and the retina would you recommend removal of the natural lens?

A: If there is a cataract resulting in impairment of vision surgery is usually recommended.

I am attached to the Singapore Eye Centre. I did not attempt to locate the records pertaining to the plaintiff's medical condition prior to 6 September 1991.

To the best of my recollection the plaintiff's lawyer did not ask me to locate the records of the plaintiff's medical condition prior to 6 September 1991.

Q: Immediately before 6 September 1991, you had no knowledge whatsoever about:

(a) (a) whether his diabetes mellitus had affected his eye sight at all;

(b) (b) if so, to what extent?

A: That is so My Lord.

[79] Dr Chan (SP5) had diagnosed left corneal scleral laceration and traumatic cataract for the plaintiff (see exh P19) and the good doctor performed toilet, suture and cataract extraction for the plaintiff. Dr Chan (SP5) also made a note that the plaintiff had diabetes on treatment and that would be diabetes mellitus because the plaintiff gave a history of diabetes. By traumatic cataract it meant cataract which was caused by external forces such as accidental hitting of the eye and Dr Chan (SP5) had no knowledge whether there was an existing cataract to the left eye (see p 37 of the second segment of the notes of evidence).

[80] Now, although Dr Chan (SP5) said that he could tell the difference between a traumatic cataract and a pre-existing cataract caused by diabetes yet (see p 38 of the second segment of the notes of evidence) he accepted that it was possible that if there was a pre-existing cataract before 6 September 1991 the traumatic cataract at p 1 of exh P19 might have overwhelmed the pre-existing cataract (see p 39 of the second segment of the notes of evidence). Dr Chan (SP5) continued with his testimony in this way (see pp 39–40 of the second segment of the notes of evidence):

Q: And if there had not been the accident and diabetes mellitus was getting worse and worse would it not be that it had developed into retinal infection, lens infection and cataract?

A: It is possible that a diabetes mellitus could have caused a cataract or diabetic rethinopathy if there was no traumatic (cataract).

Q: And if the rethinopathy was getting worse would it be possible that the Doctor would have recommended the removal of the lens anyway?

A: The decision on whether to remove the lens usually has nothing to do with the presence or absence of diabetic rethinopathy as they affect different parts of the eye.

Diabetes mellitus may cause damage to retina, lens and may even develop cataract.

Q: So, you could have a possibility of a cataract resulting from diabetes which may also damage the lens?

A: Yes, it is possible. Viewed in their change of causation, the doctor may recommend the removal of one lens if there is a bad case.

[81] Continuing his testimony, Dr Chan (SP5) had this to say at p 44 of the second segment of the notes of evidence:

Almost 4 years 3 months of no treatment (March 1986 till March 1988-P13 of p 19 of bundle 'C') and (9.4.90 to 6.7.92) in so far as this document shows in respect of this particular physician.

[82] On the same p of the second segment of the notes of evidence, Dr Chan (SP5) answered the following question:

Q: As a doctor can you say that the absence of treatment for a person suffering from diabetes mellitus during those period would aggravate the amendment?

A: Yes. Had I attended to the plaintiff at that time I would have said the same thing to him. I would scold him.

[83] Under re-examination, Dr Chan (SP5) testified as follows (see p 46 of the second segment of the notes of evidence):

The severity of the trauma suggests that the cataract I saw was traumatic in nature.

But at that point of time my mind was not focused on whether the plaintiff had a pre-existing cataract.

Based on my examination and experience the plaintiff's cataract was due to trauma. In all fairness it is impossible for me to tell if there was any other cataract prior to that.

The result of the surgery was the removal of the lens of the left eye. That removal was permanent.

I could not tell if there was diabetic retinopathy in the left eye because of the traumatic cataract. The lens was removed because of the presence of a traumatic cataract.

[84] All said and done, the crucial parts of the evidence of Dr Khoo (SP4) would be as follows (see p 129 of the first segment of the notes of evidence):

(1) That the plaintiff had severe injury to his left eye with a corneal laceration, severe corneal scarring and loss of the lens.

(2) These injuries would have caused impairment of vision even in a patient who is not a diabetic.

(3) That the plaintiff's eye sight would have deteriorated to this level even if he was not a diabetic.

[85] And the crucial parts of the evidence of Dr Chan (SP5) would be as follows, running parallel with that of Dr Khoo (SP4) (see p 28 to p 29 of the second segment of the notes of evidence):

(1) That the plaintiff could have sustained the same injuries, the same impairment of vision and deterioration of eye sight.

(2) And that would be so even if the plaintiff was not a diabetic.

[86] In other words, diabetic or otherwise, the injuries sustained by the plaintiff when he accidentally fell and his left eye on the glass plate of a showcase shelf would be the same. So the direct cause of all those injuries were basically because of that

accidental fall wherein his left eye knock onto the glass plate of a showcase shelf. The diabetic had got nothing to do with it. The proximate cause was because of the accidental fall and this was independent of the diabetes mellitus. Put in another way, the accidental fall was the direct and independent cause of the removal of the lens as stated in the policy in exh P1 (see pp 1 to 9 of bundle 'B'). It was for these reasons that the plaintiff was entitled to receive RM250,000 from the defendant.

[87] I will now narrate briefly what the two witnesses for the defendant had testified.

[88] Cheong Onn Kee (SD1) testified that he has been with the defendant since July 1990. He started as an underwriter in the underwriting department of the defendant from July 1990 to December 1992. In 1993, he was promoted to the post of Assistant Underwriting Manager until the end of 1995. In 1996, he was promoted to the post of Customer Service Manager until the end of 1998. In January 1999, he was promoted to the post of Chief Underwriter in the defendant's company and still held that position when he testified on the 7th day of the hearing (10 February 1999) and on the 9th day of the hearing (22 July 1999). As at the 10th day of the hearing (10 March 2003), he was the Senior Underwriting Manager of the defendant. Although he held different designations in the defendant, he has throughout the period of employment been involved with underwriting. Cheong Onn Kee (SDI) further testified that underwriting is the assessment of risk for insurance purposes and based on the information and evidence provided a decision would be made whether to offer a standard or sub-standard policy or even to decline the application (see pp 50, 51 and 59 of the second segment of the notes of evidence as well as pp 4 and 37 of the third segment of the notes of evidence) He confirmed that from his knowledge as an underwriter at the time of the proposal form in exh P1 (see p 3 of bundle 'B' or p 1 of bundle 'C'), that would be on 16 May 1991, diabetes mellitus was material for health underwriting (see p 4 of the third segment of the notes of evidence). In cross-examination, he testified as follows when exh P13 was shown to him (see p 30 of the third segment of the notes of evidence):

Q: If someone has diabetes mellitus of this nature, would you decline cover or would you give cover by loading and/or by reducing the insured sum?

A: What type of coverage?

Q: Personal accident coverage.

A: Our decision would depend on the severity of mellitus diabetes, his occupation.

Q: You are not answering my question. I ask you, would you decline cover or would you give cover by loading and/or by reducing the insured sum?

A: Y.A., If based on this application form we will probably charge extra premium or rate up the case meaning loading.

[89] In cross-examining Cheong Onn Kee (SD1), the learned counsel for the plaintiff referred to exhs P33A to P33D with the view of rebutting Cheong Onn Kee's (SDI's) evidence that diabetes mellitus was material in health underwriting (see p 22 of the third segment of the notes of evidence).

[90] P33A is p 1 of the letter dated 5 Jun 2002 from *Reader's Digest* to Khutubul Zaman Bukhari, the learned counsel for the plaintiff himself, offering a free personal accident cover worth RM20,000 with a footnote as follows:

> *Reader's Digest* does not hold itself to be an insurer, insurance broker or insurance agent. The insurance products and services herein are provided by American Home Assurance Company.

[91] P33B is the second p of the letter which was an offer for additional coverage. P33C is the first p and P33D is the second p of the 'Acceptance For Free Insurance & Accident Care Plan'. While P34 is the prepaid envelope addressed to:

> AMERICAN INTERNATIONAL ASSURANCE COMPANY,
>
> LIMITED (ROC NO: 991084-P)
>
> AIG MARKETING (OC)
>
> P.O. BOX 10140
>
> 50704 KUALA LUMPUR
>
> MALAYSIA.

[92] P35 is the brochure 'For Reader's Digest customers'. Under cross examination, Cheong Onn Kee (SD1) had this to say by way of question and answer (see pp 26–27 of the third segment of the notes of evidence):

Q: P1 at p 3 has a detailed disclosure requirement whereas P33C and P33D has no detailed disclosure requirements. Do you agree?

A: What is the meaning of detailed disclosure requirement?

Q: If you look at P1 at p 3 there are so many questions and answers whereas in P33C and P33D there are no such detailed questions. Do you agree?

A: Yes.

Q: Do you agree in P33C and P33D there are no questions on diabetes, do you agree?

A: Yes, I agree.

Q: Would you agree that in P33C and P33D there are no questions on previously held, reduction in insured sum application and so on?

A: Yes.

Put: Therefore I put it to you that in a personal accident insurance policy having diabetes mellitus and non disclosure of previous policies are not material factors in underwriting. Yes or no?

A: No.

[93] At pp 28–29 of the third segment of the notes of evidence, Cheong Onn Kee (SD1) was questioned further under cross-examination. It went like this:

Q: Do you know what are the responsibilities of an agent?

A: I do not know. Now I say in general because they bring in business for the company.

Q: Can I say that an agent must act reasonably with proper skill?

A: Not clear by the word reasonable.

Q: Your agents must have skills in dealing with potential customers. Do you agree?

A: Yes.

Q: They must act honestly.

A: Yes.

Q: The agents must carry out the transactions for which they are employed?

A: Yes.

Q: They must account to you for all monies received.

A: Yes.

Q: If a customer discloses certain things to the agent, the agent must disclose it in the application form?

A: Yes.

Q: If a potential customer discloses diabetes, the agent must record it in the application form?

A: Yes.

Q: If a customer discloses other policies held overseas the agent must record it?

A: Yes.

Q: If the agent is in breach of those things which you said 'Yes to', what would happen to him?

A: I am not sure YA.

Q: Who is certain about the nature of the action to be taken against the agent?

A: It is handled by the agency's administration who is in charge of all the agents.

Q: From your knowledge if the agent is in breach can they be terminated?

A: I believe so.

Q: Can the agent be made to indemnify your company for the losses suffered?

A: I am not sure.

[94] At p 30 of the third segment of the notes of evidence, Cheong Onn Kee (SD1) answered the following question in this way:

Q: Can your head office in Hong Kong obtain the details of the insurance policies from the Singapore's AIA's office?

A: I believe so if they write to them.

[95] Under re-examination at pp 35–36 of the third segment of the notes of evidence, Cheong Onn Kee (SD1) testified as follows:

Q: In regard to P33A under column declaration/signature of applicant, I ask you if the coverage were to be issued by the defendant company what would happen if an applicant had declared one or more health impairments?

A: We will not offer any coverage.

Q: Why is that?

A: The declarations state that the applicant must be in good health and free from physical impairment or deformity.

[96] Leow Ah Looi (SD2) was the last and the second witness to be called by the defendant. She testified that she was the one who approved the plaintiff's application in exh P1 (see p 3 of bundle 'B' or p 1 of bundle 'C') and she signed in the underwriter's column (see her answers to questions 7 and 8 of exh D36). She had been with the defendant for 21 years starting as a secretary in the Accident and Health department in 1980 until 1995. She was promoted to the post of an Executive in 1996 and in 1998 she was re-designated as Underwriting Executive in the Accident and Health department. Finally, in 1998 she was promoted to the post of Assistant Administration Manager of the same department and remained so as at the time of giving evidence. As at 16 May 1991, the date of the application in exh P1, her duties as an Underwriting Executive included assessment of risk in personal accident insurance applications (see her answers to questions 4 and 5 of exh D36). As an Underwriting Executive, she was trained by the defendant's Medical Director by the name of Dr Fajah and this consisted of the in-house training. She was also exposed to the 'on the job' training regime (see her answer to question 6 of the exh D36).

[97] According to Leow Ah Looi (SD2) she took about 30 minutes to approve the plaintiff's application in exh P1 on 20 May 1991 because the information supplied by the plaintiff was complete and there was no indication of any health impairment of the plaintiff. She testified that the plaintiff answered 'No' to questions numbers 10A, 10D and 10E in the proposal form (see her answers to questions 12, 13 and 14 of exh D36). Leow Ah Looi (SD2) further testified that had the plaintiff declared that he had diabetes mellitus she would have called for an attending physician's statement from the plaintiff because diabetes mellitus was significant for the underwriting of personal accident application (see her answers to questions 15 and 16 of exh D36). According to her, if diabetes mellitus had then been confirmed she would have reduced the sum assured to RM 250,000.00 and imposed a 50% loading on the premium (see her answers to questions 17 and 18 of exh D36). According to her if the proposal form had disclosed a bad and uncontrolled or untreated diabetes mellitus, she would have declined the application (see her answer to question 21 of exh D36). According to her if the plaintiff had disclosed that:

(a) according to exh P13 (pp 19 and 21 of bundle 'C') as at 2 March 1988 the plaintiff had had diabetes mellitus for two years with no treatment and that as at 25 March 1988 the diagnosis was 'diabetic severe';

(b) according to exh P8 (pp 8 and 9 of bundle 'C'), the plaintiff received treatment from 11 October 1988 to 9 April 1990 and stopped visiting the physician thereafter,

she would have declined the application in exh P1 (see her answer to question 22 of exh D36).

[98] According to Leow Ah Looi (SD2), if the plaintiff had disclosed that from 25 March 1988 to 16 May 1991 he received monthly treatment as he said in his

testimony at pp 61 and 62 of the first segment of the notes of evidence, she would have called for the current attending physician's statement and if that was not produced she would have declined the application. On the other hand, according to her, if it was produced, depending upon the control of the diabetes mellitus she would have imposed a loading and reduced the sum assured or declined the application (see her answers to questions 22, 23 and 24 of exh D36). According to her, she knew that diabetes mellitus was a material factor to consider (see her answer to question 29 of exh D36).

[99] Under cross-examination, Leow Ah Looi (SD2) was asked the following questions and she gave the answers thereto (see pp 41–45 of the third segment of the notes of evidence):

Q: In regard to question 9, I ask you: how do you ensure that your agent asks the proper questions and the agent records the proper answers?

A: It is quite difficult to ensure. If an agent who is not experienced is the one who fills up the application and he has not disclosed the exact information that has been disclosed to him by the applicant then are you in a position to know about it?

A: No.

Q: If the agent has been subsequently informed that he has not disclosed what has been told to him after the issuance of the certificate, what is the duty of the agent to your company?

A: The agent has to inform the company.

Q: If the agent fails to inform the company, then how do you go about protecting the interest of the policy holder?

A: If the agent does not inform us then the company is not aware and I can't do anything to protect the policy holder.

D36 question 10 shown to witness and she was asked:

Q: How do you know whether the agent has explained this clause to the potential customer?

A: I will not know that the agent has explained all the clauses to the customer.

Q: Do you know the agent by the name of Ng See Sun?

A: No, I don't know.

Q: So you would also not know how long he — referring to Ng See Sun, has been with AIA?

A: I don't know.

Q: Do you know whether Ng See Sun is proficient in the English Language?

A: I will not know.

Q: Do you know whether Ng See Sun has translated everything to the applicant in this case?

A: No.

Q: Are you aware that some insurance companies, the questions in their application forms are translated into the Chinese dialect and it appears in the application form as well?

A: I do not know.

Q: Take a look at question 14 of D36. Would you agree with me that you have no personal knowledge of what the plaintiff has said to those answers and your evidence is purely based on the application form which was filled up by the agent?

A: Yes.

Q: Do you know that the plaintiff had actually disclosed diabetes and his other insurance policies in Singapore to the agent, do you know that?

A: No.

Q: Are you aware that in some individuals PA cover application forms and in group PA cover application forms there are no questions on whether the applicant has diabetes or other insurance policies?

A: I am not aware.

Put: That diabetes mellitus and other insurance policies are not material in the PA cover, yes or no?

A: I disagree.

Question 22 of D36 was shown to the witness and P13 was also shown to the witness and she was asked:

Q: If somebody applies for a PA cover like P13 how much would you insure him or how much loading which you will place or whether you decline?

A: Based on exh P13, I would decline the case.

Question 23 of D36 shown and the question was put to her:

Put: There is no provision for the plaintiff to produce the physician's statement as your company has a panel of doctors who will be able to conduct a medical check-up. You agree or not?

A: I disagree.

Q: Do you know where you got D15 and D16?

A: I am sorry, I can't answer.

Under re-examination, Leow Ah Looi (SD2) testified as follows (see p 45 to p 46 of the third segment of the notes of evidence):

Q: Throughout your employment with the defendant's company, were you ever in charge of agents?

A: No.

D15 and D16 shown to witness and she was asked:

Q: Could you inform Y.A. whether you were involved in the decision making process of the defendant's company in rejecting the plaintiff's claim and who would know how D15 and D16 came about?

A: No, I would not know.

Q: When an application form came to you for underwriting purposes, do you have to double check with the agent on the information stated in the application form or do you assume that the information were correctly recorded?

A: I would assume that the information were correctly worded.

[100] I was urged to accept the evidence of both Cheong Onn Kee (SD1) and Leow Ah Looi (SD2) following cases like *Tan Kang Hua v Safety Insurance Co* [1973] 1 MLJ 6, FC; and *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan*. I must put on record that these two witnesses were cross-examined in material particulars. Prospective policy holders are at the mercy of their insurance agents. It seemed that recalcitrant agents who failed to record all the disclosures made by the policy holders in the proposal forms filled by that infamous agents will not be held accountable. Even Cheong Onn Kee (SD1) was not sure whether an insurance agent can be made liable to indemnify the insurance company for any losses sustained. Surely the courts exist to protect, inter alia, prospective policy holders.

[101] This was a case where the plaintiff had disclosed everything to insurance agent Ng See Sun but the said agent failed to record those details in the proposal form in exh P1. What agent Ng See Sun knew must be imputed to the insurer defendant. Put differently, by virtue of s 44A of the Insurance Act 1963, the knowledge of agent Ng See Sun would be deemed to be the knowledge of the insurer defendant and, consequently, all the alleged material non-disclosures must now be deemed to have been disclosed to the insurer defendant. The facts of the present case permitted me to invoke s 44A of the Insurance Act 1963 unlike the following cases:

(1) in *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* where the court pointed out that there was collusion between the plaintiff and the agent and that excluded the application of s 44A of the Insurance Act 1963;

(2) in *American International Assurance Co Ltd v See Ah Yu* where there was no evidence of disclosure by the insured to the agent and hence the insured was unable to invoke s 44A of the Insurance Act 1963; and

(3) in *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan* where, again, there was no evidence of disclosure by the insured to the agent and hence the insured was unable to invoke s 44A of the Insurance Act 1963.

RULING AS TO THE ADMISSIBILITY OF DOCUMENTS DID-22 AND DID-21

[102] D1D-22 is a copy of the *American International Assurance Company Life Underwriting* Volume 1, Underwriting Requirements and Ratings.

[103] DID-21 is a section of DID-22 on diabetes. It is section 5.

[104] I must, by virtue of s 73A of the Evidence Act 1950, rule that DID-22 and DID-21 are not admissible because the makers of these documents were not called as witnesses. Section 73A of the Evidence Act 1950 relates to a statement contained in a document and it is confined only to civil proceedings. Under this section, a document is rendered admissible under three possible circumstances:

(a) where the maker is called as a witness (s 73A (1));

(b) where the maker is not available (proviso to s 73A(1)); and

(c) where the maker is available but not called as a witness (s 73A(2)).

[105] In the context of the present case, circumstance (a) was not complied with and no evidence was led to show that the maker was not available and neither was there evidence to show that the maker was available but not called as a witness. That being the case, documents DID-22 and DID-21 must be held to be inadmissible.

CONCLUSION

[106] For the reasons as adumbrated above, I allowed the plaintiff's claim with costs.

[107] In regard to interest, I allowed the pre-judgment interest at the rate of 8% interest from the date when the cause of action arose to the date of the judgment. I too allowed the post-judgment interest at the rate of 8% interest from the date of judgment until the judgment is satisfied.

Plaintiff's claim allowed with costs.

Reported by K Krishnan